MOTION FILED

AUG 19 1999

Nos. 99-29 & 99-5

In the Supreme Court of the United States

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON and JAMES LANDALE CRAWFORD,
Respondents.

and

UNITED STATES,
Petitioner,

v.

ANTONIO J. MORRISON and JAMES LANDALE CRAWFORD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994 that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress' power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. § 13981, is a valid exercise of Congress' power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this motion for leave to file the attached brief amicus curiae and brief amicus curiae in support of the petitions for writ of certiorari.[1] Written consent for amicus participation in this case was granted by counsel for petitioners and lodged with the Clerk of this Court. Counsel for Respondents have withheld consent.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause and constitutionality of various provisions of federal law. For example, PLF participated as amicus curiae before the United States Supreme Court in *Alden v. Maine*, 67 U.S.L.W. 4601 (1999); *Printz v. United States*, 521 U.S. 98 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981). PLF has also participated before lower federal courts addressing the constitutionality of other federal enactments, including

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

appearing as amicus in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998); and *Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997).

PLF contends the lower court correctly decided this case. Nonetheless, PLF supports the petitions for writ of certiorari because PLF believes that the federal courts require further guidance from this Court on the constitutional and legal principles involved. With the exception of the court below, the federal courts of appeal have all but ignored this Court's decision in *United States v. Lopez*. They routinely reject Commerce Clause challenges to all manner of federal legislation without undertaking adequate analysis, and have relegated *Lopez* to an aberration, rather than a statement of the law. It is the position of PLF that, without further guidance from this Court, the lower courts will continue in this vein. The purpose of this brief is to provide this Court with an overview of federal Commerce Clause litigation to demonstrate how the lower courts have incorrectly applied this Court's precedent in *Lopez*. This brief does not address the Petitioners' Fourteenth Amendment argument. PLF believes this brief will provide a perspective not offered by any party supporting this petition.

For these reasons, PLF respectfully requests that this Court grant its motion for leave to file the attached brief amicus curiae.

DATED: August, 1999.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

The interest of Amicus Curiae Pacific Legal Foundation is set forth in the preceding motion.

STATEMENT OF THE CASE

The federal Violence Against Women Act creates a private right of action against any "person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). Petitioner Christy Brzonkala brought a civil cause of action against the Respondents based upon this provision. Respondents defended the suit by arguing that Congress lacks authority under the Commerce Clause to create this federal right. Petitioner United States intervened to defend the statute.

Relying upon this Court's decision in *United States v. Lopez*, the district court held this law invalid. *Brzonkala v. Virginia Polytechnic Institute*, 935 F. Supp. 779 (W.D. Va. 1996). On appeal, the Court of Appeals reversed in a split decision. *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949 (4th Cir. 1997). But on rehearing, in a 7-4 en banc decision, the Fourth Circuit held that the federal government lacks authority under the Commerce Clause to enact the civil cause of action provision of the Violence Against Women Act. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999). The Petitioners are seeking this Court's review.

SUMMARY OF ARGUMENT

In 1995, this Court decided a landmark Commerce Clause case, *United States v. Lopez*, 514 U.S. 549 (1995). In that case, this Court invalidated the Gun Free School Zones Act, which made it a federal crime for any person to possess a firearm within 1,000 feet of a school. *Lopez*, 514 U.S. at 552. This Court held that the interstate Commerce Clause of Article 1, Section 8, Clause 3, of the Constitution did not stretch so far as to enable Congress to regulate conduct, such as the possession

of a gun in a school zone, having no logically direct connection to the regulation of interstate commerce. *Id.* at 567. That decision was the first Supreme Court decision striking a federal act on Commerce Clause grounds since 1936. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

Lopez revitalized the concept of enumerated powers upon which the United States Constitution and our federalist form of government is based. That decision reinvigorated once-shy litigants to bring Commerce Clause challenges to various other federal enactments having dubious connections to interstate commerce. For example, challenges have been made to the Violence Against Women Act, the Child Support Recovery Act, and the Driver's Privacy Protection Act. Litigants have also challenged assertions of federal jurisdiction over entirely intrastate noncommercial conduct, such as federal prosecutions of intrastate robberies and arsons, and federal agency jurisdiction over local endangered species and isolated wetlands.

Notwithstanding the facts adduced in these cases, the inadequacy of congressional rationales for federal commerce legislation, the unprecedented intrusion of the federal government into state matters such as crime and family law, or, for that matter, the relative strengths and weaknesses of the arguments put forward by counsel in these cases, a majority of the federal courts of appeals have disparaged this Court's decision in *Lopez*.[2] With the exception of the court below, these courts have routinely, and often summarily, rejected challenges based upon the principles and reasoning announced in that case. It is this refusal to faithfully apply *Lopez* that demands this Court's review.

[2] Some federal district courts have found certain federal acts, or applications of federal acts, unconstitutional under *Lopez*. However, when appealed, the circuit courts of appeals have consistently overturned these decisions. *See, e.g., United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *overruled*, 95 F.3d 787 (9th Cir. 1996) (constitutionality of Child Support Recovery Act).

This case does not present a traditional basis for granting a petition for writ of certiorari. There is no conflict in the circuits on the constitutionality of this statute.[3] The court below did not depart from this Court's decisions, and did not decide any questions of constitutional law that this Court has left unsettled. Rather, this case merits consideration by this Court, because *the Court below is the only federal court of appeals that has correctly followed and applied this Court's precedents*. Despite the relative longevity of the *Lopez* decision, particularly in light of the plethora of cases that have legitimately raised precisely the issue decided in that case, it is clear the lower courts will continue to disregard this Court's ruling unless this Court exercises its supervisory powers by providing further clarification and guidance to the lower courts on the principle of enumerated powers.

ARGUMENT

I

NOTWITHSTANDING *UNITED STATES v. LOPEZ*, THE COMMERCE CLAUSE HAS BEEN CONSTRUED BY FEDERAL COURTS TO ALLOW CONGRESS AND ANY FEDERAL AGENCY TO EXERCISE POWER UNRESTRAINED BY LIMITATIONS IMPOSED BY CONNECTIONS TO INTERSTATE COMMERCE

A. Federal Courts Have a Role in Curbing Federal Overreaching, Particularly Where Expansions of the Commerce Power Address Matters More Appropriately Addressed by State Police Powers

Before *United States v. Lopez* Congress's commerce powers were unlimited. "[One] wonder[s] why anyone would make the mistake of calling it the

[3] No other federal courts of appeals have addressed the constitutionality of the specific provision at issue in this case. However, some federal district courts have reached conflicting results. *See, e.g., Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997).

> Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'"

United States v. Wall, 92 F.3d 1444, 1454 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) (citations omitted). And since this Court's 1995 decision in *Lopez*, litigants have persisted in the hope that the concept of enumerated powers, a bedrock principle of the United States Constitution, has been revitalized. No longer would federal courts merely observe the formality of paying lip-service to constitutional limitations on limited federal power, but would in fact assume the role granted to them by Article III: "to declare all acts contrary to the manifest tenor of the constitution void." The Federalist No. 78, at 394 (Alexander Hamilton) (Garry Wills ed., 1982). Alas, that hope has not been fulfilled. Instead, this Court's decision in *United States v. Lopez* has been relegated to the status of an aberration in an almost seamless record of federal court acquiescence to congressional incursions into matters having the merest pretension of involving interstate commerce.

Lopez did nothing to stem the tide of congressional interference with matters more properly falling within the sphere of state and local regulation. Indeed, *United States v. Wall*, cited above, is particularly illustrative of the peculiar degree to which Congress will reach into nonfederal matters. In that case, the Sixth Circuit Court of Appeals affirmed the conviction of several defendants engaged in a gambling enterprise, holding that the federal statute there was legitimately within Congress' commerce powers. *Wall*, 92 F.3d at 1452. The statute made it a federal crime to participate in an "illegal gambling business" of a certain size. Quite apart from the question of whether intrastate gambling is or is not interstate commerce, the statute itself is a revelation. It states, in pertinent part:

> (b) As used in this section--
>
> (1) "illegal gambling business" means a gambling business which--
>
> (i) *is a violation of the law of a State or political subdivision in which it is conducted.*

18 U.S.C. § 1955 (emphasis added). That is, the statute essentially made it a federal crime to commit a state crime. Apparently, in its zeal to do *something* about the evils of gambling, it did not even faze Congress that the law it was passing was, by its own terms, completely unnecessary.

The inherent desire of Congress to pander to popular sentiment by remedying any and every perceived and politically useful evil has, as a matter of pragmatism, resulted in an institutional insensitivity to constitutional concerns in general and federalism in particular. However, the political considerations which make Congress' avoidance of difficult constitutional choices understandable, even if not admirable, has, at least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), no place in the judicial branch. The law of the Constitution, that case held, is superior to legislative law, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Yet despite this Court's efforts in *Lopez* to say what the law is, many federal appellate courts have opted instead to acquiesce with unquestioning deference to the will, if not the whim, of the legislative branch by sanctioning laws addressing any subject Congress may choose. This degree of deference undermines the role, indeed the very purpose, of the federal courts. "It is far more rational to suppose that the courts were designed . . . to keep the [legislature] within the limits assigned to their authority." The Federalist No. 78, at 395 (Alexander Hamilton).

Thus, while it might be expected that *Lopez* would have no effect in curbing congressional decisionmaking, it should not be countenanced by this Court that *Lopez* is similarly having little or no effect on judicial decisionmaking. Yet, since that decision, among the dozens of cases that have come before federal courts entertaining Commerce Cause challenges to federal legislation, federal agency rulemaking, and federal jurisdiction, these lower courts have repeatedly "stretched the limits of Congress' commerce powers and, some would argue, the bounds of reason" to sustain federal action. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir.), *cert. denied*, *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). In short, as demonstrated below, despite *Lopez*, Congress may continue to legislate at will without restraint from the federal courts.

B. A Brief Overview of Federal Judicial Decisionmaking Since *Lopez* Demonstrates That Lower Federal Courts Have Limited Its Holding to the Point of Nonexistence

Since this Court's decision in *Lopez*, the lower federal courts have had ample time to digest its reasoning, and ample opportunity to apply it to all manner of federal action. Yet, while these courts readily acknowledge the correctness of the principles announced there, they have so far succeeded in distinguishing virtually every other federal action from the situation this Court confronted in *Lopez*. The ingenuity of these rationales has not merely rendered *Lopez* a nullity, these rationales have rendered the very concept of enumerated powers a nullity.

For example, in *United States v. Michael R.*, 90 F.3d 340 (9th Cir. 1996), the Ninth Circuit upheld the conviction of a juvenile for possession of a firearm. The statute provided:

> It shall be unlawful for any person who is a juvenile to knowingly possess--
>
> (A) a handgun . . . .

18 U.S.C. § 922(x)(2). The youth challenged the constitutionality of the statute under *Lopez*. *Michael R.*, 90 F.3d at 343. Flatly contradicting the analysis put forward by this Court, the Ninth Circuit rejected the challenge, opining: "possession of a handgun by a juvenile implicates interstate commerce through the manufacturing process and by its deterrent effect on interstate travel." *Id.* at 345. And despite the fact that the statute at issue was entirely silent on the issue of drugs, the Ninth Circuit decided to delve into the manufacturing process itself, by fabricating its own interstate commerce rationale:

> We also find a nexus between this statute and Congress's efforts to control firearms and drug trafficking. In today's drug culture, it is not uncommon for runners to be under 18 years old. And as reflected by the crime statistics, many of them carry guns. It is logical, then, that a statute regulating the sale, transfer, and possession of handguns by juveniles could have a substantial effect in curbing the illegal flow in commerce of drugs and firearms.

Id. Thus, according to the Ninth Circuit, it was merely Alfonso Lopez's good fortune that he was being convicted under a law where Congress had merely sought to regulate guns in a school zone. Had Congress instead chosen to regulate all gun possession everywhere, he would have fallen squarely within the bounds of federal commerce regulation.

If the Ninth Circuit's analysis in *Michael R.* is correct, the flaw with the statute in *Lopez* was that Congress had not drafted it broadly enough. That is, in order to cure defective legislation, Congress need only draft its statutes so broadly that they legitimately encompass at least *some* interstate commerce activity (here, a sale), however remote that activity may be to the activity *actually* being regulated by the statute. That

spurious premise is one the lower courts have relied upon in upholding federal regulation of private, intrastate, noncommercial activities.

But ironically, the fact that the Ninth Circuit felt it necessary, after *Lopez*, to reach its decision by at least engaging in its dubious justification is to that court's credit. Other federal courts have found such attenuated leaps entirely unnecessary. Thus, in *United States v. Cardoza*, 914 F. Supp. 683 (D. Mass. 1996), the court upheld the same statute, stating:

> As *Lopez* demonstrates, handgun possession--particularly handgun possession by juveniles--is subject to federal regulation because, while one specific instance of possession may not by itself have the requisite substantial impact upon interstate commerce, it can "through repetition elsewhere, substantially affect . . . interstate commerce."

Id. at 687 (citing *Lopez*, 514 U.S. at 567). The quoted statement in *Lopez* literally said "[t]he possession of a gun in a local school zone *is in no sense an economic activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567 (emphasis added). Apparently, that court found in this Court's plain language that *Lopez* means exactly the opposite of what was said.

Modern Commerce Clause jurisprudence, at least in the lower courts, holds that the mere movement of any item in interstate commerce renders that object subject to federal regulation in perpetuity, such that the simple possession of the object, let alone any activity involving the object, may itself be declared a federal crime.[4] In fact, in *United States v.*

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[4] In *Scarborough v. United States*, 431 U.S. 563 (1977), this Court upheld a conviction under a federal statute banning the possession of a (continued...)

Winningham, 953 F. Supp. 1068, 1076 (D. Minn. 1996), a federal court held that the one-time interstate movement of a *component* of an object rendered that object subject to federal jurisdiction in perpetuity.[5]

Given this state of affairs, one is left to ponder why the Framers of the Constitution bothered to confer additional powers upon Congress through 17 specific enumerations. In other words, Article I's grants of authority to Congress to create patents and copyrights and to raise armies are superfluous, since patented devices daily move in interstate commerce, and war entails the use of objects manufactured or shipped in interstate commerce. In short, the mere fact of interstate commerce has rendered virtually every activity connected with a manufactured object subject to federal control.

Congress may also regulate any activity so long as anyone involved in the activity is engaged in interstate commerce. For example, Congress may federalize any old garden-variety state crime, such as robbery, so long as it involves someone engaged in commerce, regardless of whether the crime itself involves

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[4](...continued)
firearm by a convicted felon. In so holding, this Court found the fact that the firearm had once moved in interstate commerce was sufficient to meet the jurisdictional element of the crime, regardless of the fact that the felon had possessed the firearm for a considerable period of time prior to his felony conviction. If Congress may regulate the mere possession of any object in perpetuity on the basis that it once moved in interstate commerce, Congress may regulate virtually everything in a person's home (including the home) and perhaps any activity connected to it. This appears to be in direct contravention of this Court's later statement in *Lopez* that a commerce rationale must have *some* limits. *See Lopez*, 514 U.S. at 564.

[5] The court held that the prior movement of unexposed Polaroid film in interstate commerce was sufficient to establish federal jurisdiction for possession of pornographic photographs taken intrastate with that film. *United States v. Winningham*, 953 F. Supp. at 1076.

interstate commerce. In *United States v. Pettiford*, 934 F. Supp. 479 (D. Mass. 1996), a Hobbs Act conviction was upheld where the defendant stole $200 from an auto body shop. *Id.* at 483. The defendant challenged the application of the Hobbs Act on the ground that it did not meet the "substantial effects" test of *Lopez*. The court there had no trouble dispensing with *Lopez*, relying upon the "depletion of assets" theory developed by some courts of appeals. Its analysis:

> Under this theory, "'commerce is affected when an enterprise, which is either actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted . . . , thereby curtailing the victim's potential as a purchaser of goods.'" [Citations omitted.]
>
> . . . .
>
> . . . [I]n the instant case, the government presented evidence that Stadium Auto Body engages in interstate commerce. For example, Stadium accepts national credit cards as payment for services rendered and receives reimbursement from insurance companies that operate nationwide. In addition, Stadium orders sheet metal from a company in Connecticut and obtains other parts from companies in New Hampshire and Rhode Island. That the government tendered no evidence that credit card slips were stolen, that the stolen cash was proceeds from national insurance companies or that the stolen money would have been used to purchase parts from out of state companies is inconsequential. *Given that Stadium engages, at all, in interstate commerce, one might divine that some or all of the $200 stolen was earmarked to buy materials from out of state.* The minimal depletion of assets and its potential impact on Stadium's commercial activity, albeit slight, is

> sufficient evidence of a reasonable probability of a *de minimis* effect on interstate commerce to sustain a probable cause finding of a Hobbs Act violation.

Id. at 482-83 (emphasis added). The logical result of this rationalization is obvious. The "depletion of assets" theory is adaptable to the theft or destruction of any property at all. This theory would authorize a general federal police power over virtually any crime, based solely on theoretical or potential effects on interstate commerce.

Other federal courts have concluded that the interstate commerce impact required for a Hobbs Act violation is so minimal that it need not even exist. In *United States v. Woodruff*, 941 F. Supp. 910 (N.D. Cal. 1996), the defendant challenged his Hobbs Act prosecution for the entirely intrastate robberies of three jewelry stores. *Id.* The district court granted the defendant's motion for acquittal after eliciting evidence from the victimized store owners that, though the stores themselves did engage in some interstate commerce, the robberies would have no impact on any interstate commerce in which they were engaged. *Id.* at 924-25. The Ninth Circuit reversed: "We have since held that *Lopez* did not render our use of the *de minimis* standard in Hobbs Act robbery cases constitutionally infirm." *United States v. Woodruff*, 122 F.3d 1186 (9th Cir. 1997). In short, it was enough that the stores engaged in some interstate commerce to bring the conduct under federal Commerce Clause jurisdiction. Yet, what crime victim, whether an individual or an entity, whether the crime is a robbery, murder, assault, or mugging, does not engage in interstate commerce?

The relatively simple act of stealing a wallet amply meets a multitude of federal judicial interstate commerce tests. If the wallet itself or the money inside it once moved in interstate commerce, it can be reached under the *Scarborough* or *Winningham* tests. If the wallet contains credit cards or the theft is insured, it meets the *Pettiford* or *Woodruff* tests. All

thefts, actually or theoretically, diminish one's ability to engage in untold transactions involving interstate commerce: the theft of a mere quarter could deprive a person from making an interstate telephone call.

Based on these precedents, federal courts have essentially adjudged Congress to be liberated from observing the "interstate" limitations on the commerce governed by Article I, Section 8, Clause 3. Congress may regulate any item that once moved in interstate commerce, *Scarborough, supra*; any item whose components once moved in interstate commerce, *Winningham, supra*; any item that could be used to affect commerce, *Michael R., supra*; and any activity involving a commercial enterprise, *Pettiford, supra*, even where that activity has no effect on interstate commerce, *Woodruff, supra*.

Yet these constructions still do not approach the limits of federal power, because the existence of actual commerce can be a superfluity as well. In *United States v. Hallmark Construction Company*, 14 F. Supp. 2d 1069, 1074 (N.D. Ill. 1998), a federal court upheld federal agency jurisdiction over the filling of an isolated wetland against a *Lopez* challenge. Following circuit precedent, the court held that because

> the cumulative loss of wetland habitats has reduced the population of many bird species and has impaired the ability of people to hunt, trap, and observe those migratory birds

federal regulation of intrastate isolated wetlands is valid under the Commerce Clause. *Id.* at 1074-75. That is: (1) migratory birds sometimes use wetlands; (2) there is interstate commerce in hunting, trapping, and observing migratory birds; (*see Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256-61 (7th Cir. 1993)); (3) filling in a wetland may diminish habitat of migratory birds; so, (4) therefore, filling in a wetland may ultimately impact interstate commerce in hunting, trapping, and observing

migratory birds. In sum, if a duck may wish to use your land, Congress may invoke its commerce authority to regulate it.

Nonetheless, what is interesting about the "glancing duck" rationale is not its absurdity, but the fact that the government bothered to fabricate a link between wetlands and commerce at all. In *National Association of Home Builders v. Babbitt (NAHB)*, 130 F.3d 1041 (D.C. Cir 1997), *cert. denied*, 118 S. Ct. 2340 (1998), the court dispensed with the necessity of identifying an actual link between a regulated activity and interstate commerce. In that case, the court held that the federal government could regulate the intrastate isolated habitat of the Delhi Sands flower-loving fly, a species whose entire population exists within a narrow area of Southern California. *Id.* at 1044. Purporting to rely upon *Lopez*, the court reasoned: biodiversity has some indeterminate effect on present and future possibilities of interstate commerce; therefore, the federal government may regulate fly habitat on the basis that the fly plays some part in the world's biodiversity.[6] *Id.* at 1052-54. *See also Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997). Thus, in going to such lengths to develop its migratory bird rationale, the Army Corps of Engineers is being miserably shortsighted. Under the rationale of *NAHB*, it is immaterial whether birds are local or domestic, migratory or stationary, seen, eaten, hunted, shipped, or traded. Birds themselves, simply by virtue of their membership in nature's kingdom, affect interstate commerce.

In short, there is no object and no human conduct that is beyond federal power, barring, perhaps, a narrow range of

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[6] The two-judge majority in that case could not agree on how regulation of fly habitat had a substantial effect on interstate commerce. *See NAHB*, 130 F.3d at 1057-60 (Henderson, J., concurring). This inability to agree, by itself, demonstrates the obscurity, if not absence, of any asserted connections between insect habitat and interstate commerce. It also shows the extreme lengths to which the federal courts will go to uphold congressional power. What does not affect "biodiversity"?

human conduct that happily falls within the protection of the Bill of Rights. The cases cited here represent a small cross-section of federal Commerce Clause jurisprudence since *Lopez* and, with the single exception of the court below,[7] the federal appellate courts have relegated *Lopez* to an inconsequential blip on an otherwise unbroken landscape of unlimited federal power. This is not to say that all of the laws that have been challenged as falling outside of Congress' Commerce Clause power have indeed been beyond congressional authority, or should have been found so by the federal courts in applying *Lopez*. However, given the sheer breadth of matters that these courts have found to be within federal authority to regulate, it is difficult, if not impossible, to avoid arriving at the rather implausible conclusion that, according to a substantial majority of the federal courts that have addressed the issue of Commerce Clause jurisdiction since *Lopez*, the only conceivable law that is beyond federal power to enact is one that regulates the possession of guns in school zones. This Court should grant the petitions for writ of certiorari to dispel this erroneous view of the federal commerce power.

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[7] The Fourth Circuit also bucked the trend with its decision in *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997), holding that the Army Corps of Engineers had exceeded its authority in enacting a regulation that sought to regulate waters that "*could affect*" interstate commerce. The federal government did not petition this Court for a review of that decision; instead, it is currently enforcing its regulation in every other circuit, and has issued separate jurisdictional guidelines for its offices in the Fourth Circuit.

II

FOR THE FEDERAL JUDICIARY TO MAINTAIN ITS PROPER ROLE IN THE CONSTITUTIONAL SYSTEM, THIS COURT MUST PROVIDE THE LOWER FEDERAL COURTS WITH ADDITIONAL GUIDANCE ON DISTINGUISHING BETWEEN LEGITIMATE AND ILLEGITIMATE EXERCISES OF FEDERAL POWER UNDER THE COMMERCE CLAUSE

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?

Marbury, 5 U.S. at 176. The answer, of course, is none. And the value and purpose of a written constitution is likewise rendered a nullity where federal courts abdicate their responsibility to apply the Constitution's restraints to Congress.

The undue deference shown by federal courts to Congress' determinations of its own authority in principle and in fact upsets the balance of power between the three branches of the federal government, and, at heart, the constitutional system itself. But, though some lower courts have undoubtedly been wrong in yielding their own judgment to that of Congress, in some respects, it is difficult to fault them for exercising caution, if it may be called such, in invoking *Lopez* to overturn federal excesses. For example, in *Lopez* itself, this Court preserved it's prior Commerce Clause precedents by recognizing subtle distinctions between the statute at issue in *Lopez* and the

statutes challenged in other cases without articulating the basis for those distinctions.[8]

The observations made by the Sixth Circuit in *United States v. Wall* illustrate the problem. The majority in that case upheld a federal statute against a Commerce Clause challenge, stating:

> Until the Supreme Court provides a clearer signal or cogent framework to handle this type of legislation, this court is content to heed the concurrence of two Justices that the history of Commerce Clause jurisprudence still "counsels great restraint."

Wall, 92 F.3d at 1452 (citing *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring)). The Sixth Circuit has essentially taken the position that, even though it is fully aware of *Lopez*, it is not entirely certain what this Court said in that case or, for that matter, whether this Court actually intended what it said. And the majority of its sister circuits have followed suit. Justice Boggs' observation in *Wall* is descriptive of the current state of affairs: "I read the Kennedy-O'Connor concurrence to sound a note of caution about the scope of *Lopez*, not a note of paralysis." *Wall*, 92 F.3d at 1455 (Boggs, J., concurring in part and dissenting in part). "Paralysis" is an apt description of post-*Lopez* Commerce Clause jurisprudence. While the federal courts endlessly ponder and ruminate upon *Lopez*, as a practical matter, it is the dissent in *Lopez* that appears to be carrying the day. Barring the Fourth Circuit's modest and painstakingly

[8] For example, this Court did not fully explain *Wickard v. Filburn*. *Lopez*, 514 U.S. at 560. Yet, as Richard Epstein observed, "Could anyone say with a straight face that the consumption of homegrown wheat is 'commerce among the several states?'" Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1451 (1987).

thorough forays into applying *Lopez*,[9] the federal courts of appeals have reached an impasse.

This impasse is itself worthy of this Court's notice. And while it may be peculiar to seek review of a decision correctly decided, the present case nevertheless presents a problem in need of this Court's resolution. It is not merely the constitutional question dealing with the scope of the commerce power that is on trial, but the role of the judiciary itself, and the integrity of the appellate system. The longer federal courts are allowed to continue to misapply, ignore, or limit this Court's decision in *Lopez*, the less clear it becomes what role, if any, the federal courts play in maintaining the checks and balances that sustain our federal system. And if the lower federal courts are free to selectively employ this Court's precedents to reach any preferred result, there is little need for this Court's review of any question of law. In short, this Court should grant the petitions for writ of certiorari to protect the integrity of the federal judiciary as set out in Article III of the Constitution. The court below did not merely decide the law correctly, it imbued itself with some small measure of constitutional purpose.

As stated above, traditional reasons for granting a writ of certiorari are not apparent in this case. There is no conflict in the circuits on the constitutionality of this particular statute. The court below has neither decided an important question of

[9] Despite any claims made by Petitioners, the Fourth Circuit has been cautious in applying *Lopez*. For example, as pointed out in Footnote 7 above, in *Wilson*, the Fourth Circuit stopped short of invalidating the Army Corps' wetlands regulation on Commerce Clause grounds, instead finding that the regulation was *ultra vires*. *Wilson*, 133 F.3d at 257. The Fourth Circuit upheld the Freedom of Access to Clinics Act against a Commerce Clause challenge *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997), and its decision in *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3696 (1999), striking the Driver's Privacy Protection Act as violating the Commerce Clause, relied upon this Court's Tenth Amendment precedents.

federal law in contravention of this Court's precedents, nor has it sought to resolve an important question of law left unsettled by this Court. Indeed, the decision below bears no legal flaws; remarkably, it adheres almost slavishly to the analysis and rationale of this Court's decision in *Lopez*. Nonetheless, this Court should grant the petitions to establish that *Lopez* remains the law, to provide further guidance to the lower federal courts in applying the law, and to reaffirm, rather than disavow, the precedent established in *Marbury v. Madison*, that Article III obligates this Court "to say what the law is." *Marbury*, 5 U.S. at 177.

CONCLUSION

Since *United States v. Lopez* was decided by this Court in 1995, litigants have brought many Commerce Clause challenges to federal legislation, federal regulatory authority, and federal jurisdiction over a broad range of private and local matters. Yet despite the copiousness of these challenges to an unmitigated flow of federal legislation on matters ranging from criminal law, to family law, to land use, most of the federal courts have uniformly and routinely rejected these challenges. The Court below stands as the rare exception to this pattern of federal court subservience to congressional will. The court below, instead, assiduously adhered to this Court's decision in *Lopez* by finding that Congress lacks the authority to create a private civil cause of action for conduct having no logical or rational connection to interstate commerce.

Petitioners seek this Court's review on the theory that the decision below is flawed, and should be overturned. But the decision below is neither flawed in its understanding of the law nor in its application of the law to the question before it. Nevertheless, amicus supports the petitions for writ of certiorari. The federal courts have unquestionably demonstrated that they require additional guidance from this Court on the question of law presented. Further, because the lower federal courts have

failed to enforce constitutional limitations on federal power by faithfully following this Court's decision in *Lopez*, the constitutional role of the Courts under Article III to maintain the balance of power between the coordinate branches has been compromised, and this Court's authority to establish the meaning of the Constitution has been undermined.

For these reasons, Amicus respectfully requests that this Court grant the Petitions for Writ of Certiorari.

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